or mistake of the clerk, and can be ascertained to have been actually sustained.

The order appealed from should be affirmed, with costs, and the judgment be made absolute against the plaintiff.

All the judges concurring,

Judgment accordingly.

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*Supreme Court of Indiana.*

JACOB KANTROWITZ *et al. v.* HANNAH PRATHER *et al.*[1]

Debts contracted by the wife on the faith of her separate estate are not, in a legal sense, an encumbrance upon such separate estate, and are, therefore, not embraced in the restriction of the statute of Indiana, which provides, that the wife shall have no power to encumber or convey lands constituting her separate estate, "except by deed in which her husband shall join."

THE opinion of the court was delivered by

GREGORY, J.—Suit by the appellants against the appellees. The complaint is as follows:—"The plaintiffs, Jacob Kantrowitz and Nathan Kantrowitz, complain of Hannah Prather, defendant herein, and say that said defendant is now, and has been for four years last past, the wife of her co-defendant, Allen W. Prather, who is also made party hereto; that said Hannah is now and has been continually for the four years last past, seised in her own right, and for her sole use and benefit, of lot No. 32 in Sims & Fidley's addition to the city of Columbus, in said county, of the value of $4000, and that the said defendant Hannah is indebted to plaintiffs in the sum of $386.45, for necessary goods, wares, and merchandise, sold and delivered by said plaintiffs, as said firm, to said defendant, Hannah, at her special instance and request, a bill of particulars of which is filed herewith, and made part hereof. The said goods were sold, and credit given to said Hannah on the faith of her said separate property, and not otherwise, the payment of which said indebtedness is a charge upon the separate property of said Hannah. Said indebtedness is due and unpaid.

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[1] We are indebted for the following opinion to the Hon. R. C. GREGORY.—EDS. AM. LAW REG.

"The articles furnished by plaintiffs to defendant were articles suitable to a person in her station in life, and the credit was given to her exclusively, her husband having no property subject to execution at or during the time the articles were being furnished. Wherefore plaintiffs pray the court for a finding of the amount due from said wife to them, and a decree charging her said separate property with the payment thereof, with costs, and also a decree and order directing her said separate property to be sold to satisfy said finding and costs; or, if more consistent with equity, to order the rents thereof to be applied, and all other proper relief."

The bill of particulars filed with the complaint shows that the goods furnished the wife were mainly female wearing apparel. The defendants demurred jointly and separately to the complaint:—

1st. That the court had no jurisdiction of the subject-matter of the action.

2d. The improper joinder of said Hannah and her said husband as defendants.

3d. That the complaint did not state facts sufficient to constitute a cause of action.

The court below sustained the demurrers as to the 3d cause, and overruled them as to the 1st and 2d.

Final judgment on demurrer for the appellees.

There are no cross-errors assigned, but it is perhaps not improper for us to say that "want of jurisdiction, had there been anything in it, should have been taken advantage of by motion to transfer the case to the Circuit Court: 2 G. & H. p. 22, § 11." But the court had jurisdiction. Title to real estate was not the *issue*, it was only an incident: *Wolcott* v. *Wighton*, 7 Ind. 44; *Holliday* v. *Spencer*, 7 Ind. 632; *Carpenter* v. *Vanscoten*, 20 Ind. 50. In no event could it have been made an issue but by sworn answer denying title. The parties defendant were not improperly joined: 2 G. & H. p. 41-2, §§ 8, 9; *Martindale* v. Tibetts, 16 Ind. 200. Is the separate estate of the wife liable in equity for debts contracted for her benefit upon the credit of it?

Until the ruling in *Yale* v. *Dederer*, 22 New York 450, it seemed to be well settled in New York that a married woman, having a separate estate, might bind it by her general engagements to pay debts contracted for the benefit of such estate, or on her own account, or for her benefit, upon the credit of it: *Methodist Episcopal Church* v. *Jaques*, 3 Johns. Ch. 77; s. c. in Court

of Errors, 17 Johns. 548; *North American Coal Co.* v. *Dyott*, 7 Paige 9; s. c. in Court of Errors, 20 Wend. 570; *Gardner* v. *Gardner*, 7 Paige 112; s. c. in Court of Errors, 22 Wend. 526; *Curtis* v. *Engel*, 2 Sandf. Ch. 287; *Yale* v. *Dederer*, 18 New York 265.

In England it is held that she may not only bind her separate property by a general engagement, written or parol, for her own benefit, or that of her estate: *Murray* v. *Barlie*, 3 Mylne & Keene's Ch. R. 209; *Owens* v. *Dickenson*, 1 Craig & Phillips' Ch. R. 48; but that she can do so by the execution of a bond as surety for her husband: 3 Atk. 69; *Hulme* v. *Tenant and his Wife*, 1 Brown's Ch. R. 16; and for a stranger, 15 Vesey 596.

In *Todd* v. *Lee and Another*, 15 Wis. 365, Chief Justice DIXON, in delivering the opinion of the court, reviewed the cases bearing on this question with marked ability, approving the ruling in *Yale* v. *Dederer*, 18 N. Y. 265, and disapproving the ruling in the same case in 22 N. Y. 450.

Lord Chancellor COTTENHAM, in the late case of *Owens* v. *Dickenson*, *supra*, put this question, perhaps on its true foundation, in holding that the general engagements of a married woman are enforced by a court of equity against her separate estate, not as executions of a power of appointment, but on the principle, that, to whatever extent she has, by the terms of the settlement, the power of dealing with her separate property, she has also the other power, incident to property in general, namely, the power of contracting debts to be paid out of it.

But, without ruling as to the extent of the power of a married woman over her separate estate by way of charging it with debts contracted by her, we think, on the weight of authority, that a court of equity will give execution against her separate estate, not only for debts created for the benefit of such estate (*Major* v. *Symmes*, 19 Ind. 117), but for her own benefit in her support. In *Major* v. *Symmes*, *supra*, this court *held*, that the clause of the statute forbidding a married woman to encumber or convey her real estate, except by deed, in which her husband shall join, relates to such direct acts of conveyance or encumbrance as previously required the consent of the husband to perfect. In *Cox's Administrator* v. *Wood et al.*, 20 Ind. 54, PERKINS, J., seemed to think that under the statute a married woman, by her separate contracts, might encumber or charge her real estate, and her per-

sonal property acquired by devise, descent, or gift, to the extent of the use and income arising therefrom, but no further, except for the purchase-money for real estate.

This question was not involved in that case, and all the remarks made on the subject are the *dicta* of the judge, and not the rulings of this court.

But in *Moore and Others* v. *McMillen*, 23 Ind. 78, the case of *Cox's Administrator* v. *Wood et al.*, *supra*, is cited as authority.

But a charge on the future rents and profits of real estate would be an encumbrance on the land.

The views expressed in the latter case therefore cannot be sustained either by reason or authority.

The statute provides that "no lands of any married woman shall be liable for the debts of her husband, but such lands and the profits therefrom *shall be her separate property, as fully as if she was unmarried: Provided*, that such wife shall have no power to encumber or convey such lands, except by deed, in which her husband shall join." This *proviso* is a limitation only on the *mode* of disposition of the wife's separate estate. The general provision would undoubtedly confer on her the power of disposition, as well as enjoyment, for the former is necessary to the latter. The restriction would not cover a disposition by will. The words "*encumber*" and "*convey*" have each a well defined meaning. And the only question is, are debts created by the wife, on the credit of her separate estate, an encumbrance within the meaning of the statute?

The idea of regarding the estate of the wife in her separate property, as in the nature of a trust for her support, and that she can only charge it by virtue of a power given her for that purpose, which has led to so much discussion and confusion, both in England and this country, is a mere fiction, and as such has been abandoned in England in the recent case (March 1861) of *Johnson* v. *Gallagher*, 7 London Jur. N. S. 273. Lord Justice TURNER there said: "The doctrine of appointment, however, seems to me to be exploded by *Owens* v. *Dickinson*, 1 Cr. & Ph. 48. A court of equity having created the separate estate, has enabled a married woman to contract debts in respect of it. Her person cannot be made liable either at law or in equity, but in equity her property may. This court, therefore, as I con-

ceive, gives execution against the property, just as a court of law gives execution against the property of other debtors." Judge REDFIELD, in a note to the case of *Todd* v. *Lee*, *supra*, 1 Am. Law Reg. p. 665, says of this decision, that "This view of the law is given by one of the ablest and most experienced equity judges now living, and upon a full review of all the English cases, and we must confess that it seems to us to have stripped the matter of much of its former complication and confusion, and to be far more satisfactory than any other view which we have yet seen." We think, at least, that the debts contracted by the wife are in no legal sense an encumbrance on her separate estate, and therefore not embraced in the restriction on her power of disposition contained in the *proviso*.

The court below erred in sustaining the demurrer to the complaint.

Judgment reversed with costs; cause remanded with directions to overrule the demurrer to the complaint, and for further proceedings.

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*Supreme Court of California.*

## WHEELER *v.* SAN FRANCISCO AND ALAMEDA RAILROAD COMPANY.

A ferry-boat or other means to cross a body of water on the line of a railroad, whether in the middle or at the end of the route, is part of the necessary property of the railroad; and the company is liable for neglect to carry a passenger across this, as well as any other part of the route.

It is settled that a railroad company may contract to carry passengers or freight beyond its own route, and the liability as a common carrier continues through the whole distance contracted for.

THE opinion of the court was delivered by

SAWYER, J.—This is an action brought against the defendant as a common carrier of passengers and freight, to recover damages sustained by plaintiff in consequence of a breach of duty on the part of defendant in refusing to carry the plaintiff across the bay of San Francisco to the city of San Francisco from the defendant's wharf, at the terminus of its railroad, in the county of Alameda, in a steamer under the control of defendant, which ran regularly between the said points in connection with the regular